86-2044

Supreme Court, U.S.
FILED
JUL 22 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, NEW YORK TELEPHONE COMPANY and CENTRAL HUDSON GAS & ELECTRIC CORPORATION,

Petitioners,

—v.—

JOSEPH CAHILL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE NEW YORK COURT OF APPEALS

RESPONDENT'S BRIEF IN OPPOSITION

RICHARD EMERY
(Counsel of Record)
Lankenau Kovner & Bickford
30 Rockefeller Plaza
Suite 4528
New York, New York 10112-0150
(212) 582-7050

STEVEN R. SHAPIRO
American Civil
Liberties Union
132 West 43rd Street
New York, New York 10036
(212) 944-9800

ARTHUR EISENBERG
New York Civil
Liberties Union
132 West 43rd Street
New York, New York 10036
(212) 382-0557

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 9

REASONS FOR DENYING THE WRIT 11

I. THE DECISION BELOW IS CORRECT AND CONSISTENT WITH THIS COURT'S STATE ACTION PRECEDENTS.....11

II. THE JUDGMENT BELOW CONTEMPLATES FURTHER PROCEEDINGS IN STATE COURT WHICH SHOULD BE COMPLETED PRIOR TO ANY REVIEW BY THIS COURT.....15

CONCLUSION 19

TABLE OF AUTHORITIES

Cases

Abood v. Detroit Board of Education, 431 U.S. 209 (1977).....7

Blum v. Yaretsky, 457 U.S. 991 (1982).....9, 11, 13

Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostook R.R. Co., 389 U.S. 327 (1967).....16

Cahill v. Public Service Commission, 84 Civ. 5447 (S.D.N.Y. 1984).....6

Cahill v. Public Service Commission, 69 N.Y.2d 265, 506 N.E.2d 187, 513 N.Y.S.2d 656 (1986).....passim

Cahill v. Public Service Commission, 69 N.Y.2d 862.....8

Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974).....9, 11, 13

Kennedy v. Silas Mason Co., 334 U.S. 249 (1948).....18

Los Angeles v. Preferred Communications, __ U.S. ___, 90 L. Ed. 2d 480 (1986).....18

People v. Wilcox, 200 N.Y. 423 (1911)....2

Railway Employees' Dept. v. Hanson, 351 U.S. 225 (1956).....15

Rendell-Baker v. Kohn, 457 U.S. 830 (1982).....11

Teleresources, Inc. v. Public Service Commission, 58 A.D.2d 406, 396 N.Y.S.2d 906 (1977).....12

Other Authorities

28 U.S.C. § 1342.....6, 10, 17

N.Y.C.P.L.R.
7804(f).....15
3211(a)(7).....15

New York Public Service Law
§ 66(12).....2, 3, 12
§ 91 (1).....2
§ 92 (1)-(2).....2, 3, 12
§ 97 (1).....2

New York Telephone Co., Case 25155, 10 PSC Rept. 345 (issued July 1, 1970).....2, 4

New York Telephone Co., Case 28601, Opinion 84-16.....3

Petition of New York Telephone Company and Central Hudson Gas & Electric Corporation.....16

PSC Opinion #84-16 Case 29701, June 22, 1984.....12

Respondent submits this brief in opposition to the petitions for certiorari filed by the Public Service Commission of the State of New York (PSC), New York Telephone Company and Central Hudson Gas & Electric Corporation, which seek review of the judgment entered in this action by the New York Court of Appeals on December 19, 1986.

STATEMENT OF THE CASE

This case involves a constitutional challenge to a state policy. The policy promulgated by the New York State Public Service Commission authorizes public utilities to contribute to private charities and to charge the cost of such contributions to customers rather than have such contributions borne by the utilities' shareholders.

The PSC is a state created agency with broad supervisory powers over the activities of all public utilities in the state. The PSC's powers include fixing the rates that utilities charge. New York Public Service Law §§ 66(12), 91(1), 92(1), 97(1). This rate-making power is a function of the PSC's mandate to protect utility customers. People v. Wilcox, 200 N.Y. 423 (1911).

Utilities are major contributors to non-profit organizations in New York State. Prior to 1970, the PSC required utilities to disburse charitable contributions from their profits. Since 1970, however, the PSC has included charitable contributions in the fixing of utility rates as "a cost of doing business" to be borne by the ratepayer. New York Telephone Co., Case 25155, 10 PSC Rept. 345, 378-379 (issued July 1, 1970). Once these

rates are set by the PSC, the utility must charge the fixed amount and the customer must pay for the service received. See New York Public Service Law §§ 66(12), 92(2).

As recently as June 22, 1984, the PSC, in the opinion which gives rise to this case, refused to reverse its policy despite the urging of the New York State Attorney General's Office. Case 28601. New York Telephone Co., Opinion 84-16, pp. 55-59.

In accordance with this policy, the amount of charitable contributions authorized for each utility by the PSC is set pursuant to a formula based upon the charitable contributions of each utility prior to the 1970 reversal of PSC policy. For example, in 1983 alone, New York Telephone Company contributed 4.9 million dollars to a wide range of non-profit groups. Under

current, established PSC policy, utility customers subsidize a significant portion of these contributions.

Of the thousands of charities which are recipients of utility contributions, the majority are either religiously affiliated, or otherwise socially or politically oriented. The recipients are selected solely at the discretion of the utility, without notice to or consent of the ratepayers. The PSC does not regulate or screen the contributions or their recipients, New York Telephone Co., Case 25155, 10 PSC Rept. at 379; however, the PSC does receive lists of every recipient of a charitable donation from every public utility in the state and has ruled that certain prospective donees do not qualify as organizations for which donations may be recaptured from ratepayers. Id.

Respondent, a practicing Roman Catholic, has lived in the Town of Fishkill, NY, for over twenty-five years. He is a customer of New York Telephone Company and Central Hudson Gas & Electric. The services he receives are unavailable from any other source because of the monopoly status conferred upon them by the PSC.

Respondent objects to being charged any amount for charitable contributions he does not control. Particularly, he objects to being compelled to support non-profit organizations supported by New York Telephone and Central Hudson Gas & Electric, which expound beliefs contrary to his own. Petitioner has never been informed by the PSC or by either of these utilities that a portion of his utility payments for the cost of service is being diverted to charities or the specific

charities to which his payments are being diverted.

Respondent initiated this case in federal court in the Southern District of New York. Cahill v. Public Service Commission, 84 Civ. 5447 (S.D.N.Y. 1984). Respondent subsequently consented to petitioner's motion to dismiss based upon 28 U.S.C. § 1342. (Anti-injunction statute withdrawing federal jurisdiction for challenges to rates set by public utilities.)

Respondent then initiated an Article 78 proceeding in the New York State courts seeking the annulment of the 1970 PSC policy that requires ratepayers to subsidize the charitable contributions of public utilities. Respondent asserted in his complaint that the PSC policy violated the First Amendment.

Petitioners moved to dismiss, contending that this rate-making policy was a

private decision by the utilities and therefore provided an insufficient basis for a constitutional challenge. That motion was denied by every New York court to rule on it.

In particular, the New York Court of Appeals held, in a 5-2 decision, that "the petition states a cognizable claim that the 1970 policy decision and the 1984 rate order of the PSC violate [respondent's] rights under the First and Fourteenth Amendments of the United States Constitution." Cahill v. Public Service Commission, 69 N.Y.2d 265, 506 N.E.2d 187, 513 N.Y.S.2d 656, 658 (1986) (citing Abood v. Detroit Board of Education, 431 U.S. 209 (1977) as controlling).

The Court reached this conclusion by carefully analyzing the complaint and rejecting petitioners' assertion that respondent was challenging the right of

public utilities to make charitable contributions. Rather, the Court noted, respondent's complaint focuses on the PSC's role in the rate-making process and its power to determine what expenses can be recovered from utility customers. As the Court of Appeals correctly observed:

> The PSC oversees the utilities for the public good as an exercise of the State's police power... It establishes maximum rates which may not be exceeded... In fact, no utility may charge more or less than the rates established by the PSC... What is at issue here is not the conduct of the utility officials, but the policy and directives of the PSC in establishing utility rates which include charitable contributions as operating expenses.

Id. at 269 (emphasis in the original).

The PSC's petition for reargument or clarification of the Court of Appeals' decision was denied. Cahill v. Public Service Commission, 69 N.Y.2d 862. It is from these determinations that petitioners have sought review in this Court.

SUMMARY OF ARGUMENT

This case involves a constitutional challenge to a ratemaking policy promulgated by the New York State Public Service commission (PSC), which compels utility customers in New York State to subsidize the ideological and charitable contributions of utility companies.

Because respondent objects to the reimbursement scheme established by the PSC and not to the contribution decision of the utility itself, the court below correctly found state action present and remanded this case to the trial court for a determination on the merits of respondent's First Amendment claim. That decision is entirely consistent with this Court's state action precedents -- including Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974), and Blum v.

Yaretsky, 457 U.S. 991 (1982) -- and does not warrant review by this Court.

In any event, the request for review is premature. The Johnson Act adopted by Congress clearly contemplates that rate-making challenges will be resolved in the first instance by the state courts. See 28 U.S.C. § 1342. This Court should not intervene until those state court proceedings have been completed. At that point, this Court will have the advantage of a full record on which to decide the entire controversy, if it so chooses.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW IS CORRECT AND CONSISTENT WITH THIS COURT'S STATE ACTION PRECEDENTS

Under this Court's most recent state action cases, the critical inquiry is whether the state has caused the constitutional violation asserted in the complaint. Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974); Blum v. Yaretsky, 457 U.S. 991 (1982); Rendell-Baker v. Kohn, 457 U.S. 830 (1982).

Petitioners challenge the state action ruling below based upon a mischaracterization of the nature of respondent's grievance. As the Court of Appeals correctly recognized, respondent does not challenge petitioners' right to make charitable contributions. Respondent challenges the ratemaking structure that

requires ratepayers to subsidize these contributions.[1/]

The structure for such rates was promulgated in 1970 by the PSC, which is solely responsible for it. Indeed, the clearest evidence of state action in this case is that ratepayers were not charged for charitable contributions prior to 1970. All that has changed between now and then is the PSC's implementation of the new rate structure that petitioner challenges in this case.[2/]

[1/] The primary responsibility of the PSC is to determine rates that are just and reasonable. Teleresources, Inc. v. Public Service Commission, 58 A.D.2d 406, 396 N.Y.S.2d 906, 909 (1977). Utilities must charge those rates, no less and no more. Cahill v. PSC, 513 N.Y.S.2d at 659; Public Service Law §§ 66(12), 92(2). Similarly, customers must use the utilities in their areas of residence which operate as monopolies and must pay the rates that the PSC sets.

[2/] Pursuant to its 1970 policy, the PSC is intimately involved with regulating the donation process, by reviewing the lists of charities submitted by the utilities and disallowing some claimed expenses as opposed to others. PSC Opinion #84-16 Case 29701, June 22, 1984 pp. 55-59.

Nevertheless, petitioners argue that the utilities' decision regarding rates are essentially private ones, and that the PSC passively approves their plans. They liken PSC ratemaking orders to the electric companies' shut-off decisions in Jackson v. Metropolitan Edison Co., supra, and the private nursing home actions in Blum v. Yaretsky, supra.

These cases are inapplicable, as the court below found. Cahill v. PSC, 513 N.Y.S.2d at 659. In Jackson, the service cut-off was caused by the utility, not by the government. Similarly, in Blum, the challenged patient transfer was undertaken by a private nursing home, not by the state. In both cases, this Court held that mere regulation of private entities by the state does not constitute state action. Jackson v. Metropolitan Edison, 419 U.S. at 357; Blum v. Yaretsky, 457 U.S. at 994.

This case, however, involves a very different constitutional challenge. As the Court of Appeals recognized:

> To bring the case within Jackson and Blum,... minimizes the function of the PSC in rate setting and characterizes its role as little more than passive acquiescence. Such a narrow view of the PSC's function,... is at odds with the broad grant or rate-setting authority vested in the PSC by the legislature (Public Service Law Sections 66, 72, 91).

Cahill, 513 N.Y.S.2d at 660.

Here, the deprivation of constitutional rights alleged by respondent was caused directly by the state agency. Specifically, the PSC developed a policy which mandates that contributions by private utilities be charged to consumers rather than shareholders. It is that policy -- and that policy alone -- that is under constitutional attack in this case.

Since it is the PSC's policy that compels respondent to subsidize the chari-

table contributions of monopoly utilities, "the cause of power and authority by which respondent's rights are lost or sacrificed, is the governmental action on which the Constitution operates." Railway Employees' Dept. v. Hanson, 351 U.S. 225, 232 (1956).

Accordingly, the Court below properly concluded that the PSC's policy represents state action which should now be subject to constitutional review.

II. THE JUDGMENT BELOW CONTEMPLATES FURTHER PROCEEDINGS IN STATE COURT WHICH SHOULD BE COMPLETED PRIOR TO ANY REVIEW BY THIS COURT

The state action questions raised in this case were resolved by the New York Court of Appeals on petitioners' pre-answer motion to dismiss. N.Y.C.P.L.R. 7804(f); 3211(a)(7). Having denied the motion to dismiss, the Court of Appeals remanded this case to the trial court for

an initial determination on the merits of the controversy. Unless and until the merits are resolved, review by this Court is both unnecessary and unwarranted. E.g., Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostook R.R. Co., 389 U.S. 327 (1967).

Petitioners urge immediate review on the ground that the questions raised by this case are not rightly posed in state court. Petition of New York Telephone Company and Central Hudson Gas & Electric Corporation Petition at 14. Petitioners suggest that this case could cause an unnecessary "tangle" of "awkward" issues and a possible conflict between federal and state courts. Id. at 15. Specifically, petitioners' focus on the possibility that they may win on the merits and respondent may not appeal, leaving the state action determination of the Court of

Appeals as the unreviewable law of New York State.

It is sufficient to note that this is not an unusual result and does not, by itself, compel an exception to the general rule against piecemeal review. That is especially true in rate challenges like this one, which Congress has specifically directed to the state courts under the Johnson Act, 28 U.S.C. § 1342.

Indeed, petitioners themselves relied on the Johnson Act in seeking dismissal of respondent's initial complaint from federal court. It is ironic, then, that they now protest the unavailability of federal review of the interlocutory order which they have orchestrated.

The New York Court of Appeals made a preliminary determination only. The case can and should now be heard on the merits in the state courts. Given the plain

import of the Court of Appeals' decision that the challenged PSC practice violates the First Amendment, it is highly unlikely that respondent will fail to appeal if he loses on the merits in the lower state courts. Thus, there very likely will be opportunity for this Court to review all of the issues in this case once the record is complete and the legal questions raised by the complaint have been fully considered in the lower courts. Cf. Los Angeles v. Preferred Communications, ___ U.S. __, 90 L. Ed. 2d 480 (1986); Kennedy v. Silas Mason Co., 334 U.S. 249 (1948). Until then, the petition for certiorari should be denied.

CONCLUSION

For the reasons stated herein, the petition for certiorari should be denied.

Respectfully submitted,

Richard Emery
(Counsel of Record)
Lankenau Kovner & Bickford
30 Rockefeller Plaza
Suite 4528
New York, NY 10112-0150

Steven R. Shapiro
American Civil
Liberties Union
132 W. 43rd Street
New York, NY 10036
(212) 944-9800

Arthur Eisenberg
New York Civil
Liberties Union
132 W. 43rd Street
New York, NY 10036
(212) 382-0557